

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application)		
and complaint of Comlink LLC)		Case No. U-16532
against Qwest Communications)		
<u>Company, LLC.</u>)		

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on April 5, 2011.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before April 19, 2011, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before May 3, 2011. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Sharon L. Feldman
Administrative Law Judge

April 5, 2011
Lansing, Michigan

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application)	
and complaint of Comlink LLC)	Case No. U-16532
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PROPOSAL FOR DECISION
RECOMMENDING DISMISSAL OF COMPLAINT

I.

PROCEDURAL HISTORY

This Proposal for Decision (PFD) addresses the January 21, 2011 Application and Complaint filed by Comlink LLC and the motion to dismiss that complaint filed on March 1, 2011 by the Respondent, Qwest Communications Company, LLC. As discussed in more detail below, the primary basis of the complaint was Qwest's alleged wrongful threat to terminate toll service to Comlink, who resold that service to ILECs and others.

At the March 8, 2011 prehearing conference in this matter, a 210-day schedule was established by agreement of the parties. In accordance with that schedule, oral argument was held on Qwest's motion to dismiss the complaint on March 18. In the intervening time period, a hearing was scheduled for March 14, on an expedited basis to address the March 9 motion Comlink filed, seeking a determination that the bond it

filed was adequate to invoke the protections of section 203(13) of the Michigan Telecommunications Act (MTA).¹ On March 11, Qwest filed a response.² This hearing was canceled when the parties indicated they had reached a stipulation resolving the matter. A copy of the stipulation was filed in this docket on March 17.

The positions and arguments of the parties related to the motion to dismiss are discussed below.

II.

DISCUSSION

A. Comlink's Complaint

Comlink filed its complaint with the supporting testimony of two witnesses and proposed Exhibits A-1 through A-6. Comlink's complaint alleges that Comlink is a facilities-based provider of basic local exchange service and other regulated and unregulated communications services, including toll service. Comlink alleges that it provides toll service to ILECs or their affiliates, who in turn provide toll service to 16,000 end users in Michigan. To provide toll service to its customers, Comlink entered into a contract with Qwest on March 2, 2010, identified as the "Qwest Total Advantage Agreement Option Z", and attached to the complaint as Exhibit A-1.

According to the complaint, Comlink specifically advised Qwest prior to entering the contract that Comlink's customers were ILECs or their affiliates, who would be using the service to serve end users. Comlink further contends that the originating and

¹ The MTA is found at MCL 484.2101 *et seq.*

² The hearing date and response date were set after the ALJ consulted with counsel in a conference call.

terminating access charges applicable to those areas were readily available to Qwest, and that Qwest used that information to establish the contract rates.

Nonetheless, according to the complaint, on December 14, 2010, Comlink received a letter from Qwest claiming wrongfully that Comlink was in violation of the March 2010 contract by engaging in “access arbitrage” as defined under the agreement. The letter (Exhibit A-3 to the complaint) claimed Comlink owed “access arbitrage” fees of \$444,450 and threatened to suspend or terminate the agreement. Comlink’s December 28, 2010 response to the letter is Exhibit A-4 to the complaint. Comlink denies that it engaged in “access arbitrage” or that it owes “access arbitrage” fees, contending, as indicated above, that Comlink’s provision of toll service to ILECs and their affiliates was specifically contemplated by the parties and the entire purpose of the agreement.

According to Comlink’s complaint, Qwest’s position was that Comlink must enter into a different contract with Qwest, described as a “wholesale contract”, or it would terminate service to Comlink and pursue its claims for the “access arbitrage” fees.

Comlink’s complaint invokes the Commission’s jurisdiction under sections 203, 204, 205, 312(2) and 313 of the MTA.³ Comlink asks that the Commission determine whether termination of the March 2010 Qwest agreement is permitted under section 313 of the MTA.⁴ It further asks the Commission grant the following relief:

- A. Enter an Order under Section 203(13) of the MTA ordering that Qwest Communications Company, LLC continue service to Comlink under the terms of the Qwest Agreement without

³ See paragraph 5 of the complaint.

⁴ See paragraph 20.

suspension, interruption or restriction until this case is closed or until further order of the Commission.

- B. Find that the Bond provided by Comlink is adequate security under MCL 203(13).
- C. Find that the use of service under the Qwest Agreement by Comlink to provide toll service to LECs does not violate the terms of the Qwest Agreement.
- D. Find that Comlink has not engaged in access arbitrage under the terms of the Qwest Agreement and that Comlink does not owe Access Arbitrage Fees to Qwest.
- E. Find that Qwest is not permitted to discontinue service to Comlink [and] that the same violates Sections 312 and 313 of the MTA.
- F. Grant such further and additional relief to Comlink as maybe authorized by the MTA, including the awarding of costs and attorneys fees pursuant to Section 601 of the MTA.

B. Qwest's Motion

Qwest's motion to dismiss contends that the Commission lacks jurisdiction over the complaint. Qwest characterizes the dispute as one involving an "unregulated wholesale telecommunications service."

Focusing on sections 203, 204 and 205 of the MTA, cited in Comlink's complaint, Qwest argues that these provisions are procedural and do not provide a substantive basis for Commission jurisdiction. Qwest argues the services it provides to Comlink under the March 2010 contract are unregulated services under section 401(1) of the MTA, because they involve "the reselling of an unlicensed telecommunications service." Qwest further argues that the Commission lacks jurisdiction to resolve disputes over the contract because it was privately negotiated with no Commission involvement.

Qwest cites the Commission's decision in Case No. U-15212 (August 7, 2007 order) to support its claim that sections 204 and 205 are "purely procedural". Qwest cites the Commission's decisions in Case Nos. U-13501 (December 6, 2002 order) and Case No U-13789 (October 23, 2003 order) to support its claim that the Commission lacks jurisdiction over privately negotiated contracts. Looking to the contract, Qwest also contends that the contract expressly requires disputes to be resolved under Colorado law, requires legal proceedings to be brought in federal court or in the State of Colorado, and further, requires disputes to be arbitrated.

Focusing on sections 312 and 313 of the MTA, Qwest denies that its termination of service under the March 2010 agreement constitutes a withdrawal of service to an exchange under section 313. Qwest argues that it is not discontinuing service to any exchange because it is willing to provide service to Comlink on different terms, and because it will still be offering the same wholesale service in the same locations throughout Michigan. Qwest also challenges Comlink's standing to bring a claim under these provisions.

C. Comlink's Response to the Motion

Comlink's March 7, 2011 response to the motion to dismiss argues that the toll service that is the subject of its complaint is a regulated service subject to the Commission's jurisdiction. In addition to sections 312 and 313, Comlink cites section 321 of the MTA, prohibiting the offering of services at rates below TSLRIC, to show the scope of the Commission's authority.

To Comlink, its complaint meets the criteria of section 204 because “two telecommunications providers are unable to agree on a matter relating to a regulated telecommunications service.” And Comlink asserts the Commission authority to grant relief under section 205(2):

If the commission finds, after notice and hearing, that the rates, quality, general availability, or conditions for a regulated service violate this act, an order of the commission under this act, or is adverse to the public interest, the commission may require changes in how the telecommunication services are provided. The commission's authority includes, but is not limited to, the revocation of a license and issuing cease and desist orders.

Comlink disputes Qwest's reliance on section 401 of the MTA, contending that the March 2010 contract is not “the reselling of an unlicensed telecommunication service”, but is the direct provision of toll service. Comlink further disputes Qwest's characterization of the March 2010 contract as a privately negotiated agreement outside the Commission's jurisdiction, contending that the cases cited by Qwest are not applicable because the contract at issue here is for a regulated service.

Comlink further responds to Qwest's standing challenge, asserting its standing to seek the protections of section 313 of the MTA under the Commission's two-prong test.

D. Staff's Response to the Motion

Staff also filed a response to the motion to dismiss on March 7, 2011. Staff characterizes Qwest's motion as principally seeking a determination that Comlink has not stated a claim on which relief can be granted, rather than challenging the Commission's jurisdiction to hear the dispute. To Staff, Comlink had standing to bring

the complaint, and the Commission has both the jurisdiction to hear at least some part of Comlink's claims, and the authority to grant at least some of the relief sought.

Staff reasoned that whether Qwest's withdrawal of service to Comlink would have the effect of depriving end use customers within any exchange of toll service was essentially a factual dispute. Staff cites to paragraph E of Comlink's request for relief, quoted above, which asks the Commission to find that Qwest is not permitted to discontinue service to Comlink under sections 312 and 313 of the MTA. Staff concluded that the allegations in Comlink's complaint properly stated a claim under section 313, by alleging that Quest and Comlink are providing toll service, and that by terminating service to Comlink, Quest would de facto be terminating service to a number of ILECs and their 16,000 end users, who rely upon the service.

To Staff, it is a reasonable inference from Comlink's reliance on section 313 that Comlink is alleging that Qwest's termination of service to Comlink will have the effect of terminating toll service to at least one entire exchange, and a key factual question that cannot be resolved on a motion to dismiss. As Staff puts it, although Qwest provides toll service "by virtue of being the sole wholesaler to the sole wholesaler to the (apparently) sole retailer of toll service that exchange":

On these facts, [section 313] would operate to bar Qwest, an admitted telecommunications provider who provides toll service, from discontinuing its service to an exchange because no other alternative telecommunications provider is furnishing that service to customers in the exchange.⁵

⁵ See Staff response, page 9.

E. Stipulation

The stipulation between Comlink and Qwest, entered into before the originally-scheduled March 14 hearing, and filed on March 17, provides as follows:

1. Comlink shall promptly commence migration of its toll traffic from Qwest to another toll provider or providers, and shall complete migration of its toll traffic by the close of business on April 1, 2011.
2. Qwest shall continue to provide toll service to Comlink through the close of business on April 1, 2011 and shall not terminate toll service to Comlink prior to that date. The Qwest Total Advantage Agreement shall be terminated on the close of business on April 1, 2011.
3. Qwest will invoice and Comlink shall pay for toll service provided by Qwest to Comlink on and after March 18, 2011 at Qwest's wholesale rate of 12 cents per minute, rather than at the rates specified in the March 2, 2010 Qwest Total Advantage Agreement between Qwest and Comlink.
4. Both Comlink and Qwest reserve all of their respective rights, claims and defenses against the other party.

In this stipulation, the parties thus agreed to terminate the March 2010 contract effective April 1, 2011.

F. Oral Argument

At oral argument on March 18, 2011, counsel for Comlink and Qwest presented arguments in keeping with the briefs they filed. In addition, Qwest contended that the case was moot by the stipulation between the parties. Comlink, however, contended that the case should continue.

Comlink argues that its complaint raises the fundamental question of whether the process by which Comlink reached its current position involved a violation of the

provisions of the MTA by Qwest. Comlink argues that the Commission has authority to make it whole with respect to the injuries it has received as a result of the violation of the MTA, including for example the cost and expense of Comlink bringing this action, as requested in paragraph F of the prayer for relief in its complaint. To Comlink, Qwest's threat to terminate service, based on an erroneous claim that Comlink was engaging in "access arbitrage" as set forth in the complaint, remains actionable even after Comlink has agreed to switch to an alternative provider. Comlink asserts that the Commission could still determine that discontinuance was not permitted under section 313, and would then determine what relief it could afford. To Comlink, Qwest's assertion that Comlink's resale of toll service to the rural ILECs constitutes "access arbitrage" raises an important question threatening the future operation of the rural ILECs, and should therefore be addressed.

Staff explained its position that toll service is regulated, but the scope of that regulation is narrow. While Staff concluded that Comlink's complaint, when filed, did state a claim within the Commission's authority, because it alleged Qwest's actions would have the effect of denying toll service to 16,000 end users, Staff believes the stipulation will essentially resolve the issue. But as Staff pointed out at oral argument, that stipulation was still executory.

G. Analysis

First, as to Comlink's standing to bring the complaint, Staff's response aptly explained why Comlink has standing to bring this complaint: "Staff believes that pursuant to section 204, Comlink's standing is self-evident. Comlink will suffer an injury

in fact if toll service is terminated by Qwest, and Comlink is clearly within the zone of interest of the statute in that it is a telecommunications provider raising a disagreement with another telecommunications provider on matter relating to toll service regulated under sections 312 and 313 of the Act.”⁶

Second, consistent with that analysis, accepting the facts in the complaint as true, Comlink’s complaint clearly stated a claim on which relief could be granted under the MTA. Sections 312 and 313 state:

Sec. 312.

- (1) The commission shall not review or set the rates for toll service.
- (2) The commission shall require that toll service is universally available to all persons within the state.
- (3) Upon commission review and approval, all providers of toll service shall make available to their customers adjacent exchange toll calling plans. All providers of toll service shall inform their customers of the available plans that provide a monthly allowance of toll calling to adjacent exchanges for which there is no local calling. All providers of toll service shall inform their customers of the available plans. The plans required under this subsection shall remain in effect under this act until altered by order of the commission.

Sec. 313.

- (1) A telecommunication provider that provides either basic local exchange or toll service, or both, may not discontinue either service to an exchange unless 1 or more alternative telecommunication providers are furnishing the same telecommunication service to the customers in the exchange.
- (2) A telecommunication provider proposing to discontinue a regulated service to an exchange shall file a notice of the discontinuance of service with the commission, publish the notice in a newspaper of general circulation within the exchange, and provide other reasonable notice as required by the commission.

⁶ See Staff response, page 7.

(3) Within 30 days after the date of publication of the notice required by subsection (2), a person or other telecommunication provider affected by a discontinuance of services by a telecommunication provider may apply to the commission to determine if the discontinuance of service is authorized pursuant to this act.

As Staff and Comlink argue, toll service is not wholly unregulated by the Commission. Under section 312, quoted above, the Commission has a broad mandate to ensure the universal availability of toll service. Under section 313, quoted above, a telecommunications provider is prohibited from discontinuing service to an exchange unless one or more alternative providers are furnishing the same telecommunication service to the customers in the exchange. Note, too, that section 306 gives the Commission authority to require a toll provider to interconnect with a provider of basic local exchange service “upon terms that are fair to both providers”. This section reinforces the tenet of sections 312 and 313, that the Commission has the authority to ensure that toll service is available to all end users. By alleging in its complaint that Qwest was threatening to discontinue toll service to Comlink, which Comlink in turn provided to ILECs and their end users, and that Commission action was necessary to maintain toll service to an exchange, Comlink thus stated a claim on which relief could have been granted.

But concluding that the Commission had authority under the MTA to grant relief to Qwest on the basis of the original complaint is not sufficient to address the present situation. As discussed at oral argument on the motion, Qwest and Comlink have now reached a stipulation to terminate their contractual agreement. Comlink voluntarily committed to switch to an alternative toll provider by April 1, 2011. While counsel for Comlink initially characterized its decision to enter into this agreement as one made

under “duress”,⁷ he subsequently characterized it as “an accommodation reached with both parties . . . reserving all their rights.”⁸

As a result of the stipulation, Comlink acknowledges that it is no longer seeking to have the Commission prohibit Qwest from terminating service under the March 2010 agreement. Instead, Comlink argues that the Commission still has jurisdiction to grant it the additional relief it seeks, including relief under paragraphs C, D and F of the prayer for relief in the complaint, quoted above.

Comlink, however, has not explained the statutory basis for the Commission to resolve the fee dispute between Comlink and Qwest in light of the express language in section 312(1) exempting toll service from rate regulation by the Commission. While Comlink characterizes the “access arbitration” dispute as one relating to “terms and conditions of service” rather than relating to rates, since the agreement is terminated effective April 1, 2011, the only remaining question involves Qwest’s claim for fees under the agreement, and Comlink’s defenses to the payment of those fees. Put another way, for the Commission to evaluate the reasonableness of Qwest’s claim for “access arbitration fees” under the agreement would require a review of the rates provided for in the agreement.

Comlink also has not identified a statutory violation by Qwest to support its claim that the Commission should continue to look into the facts behind Qwest’s threat to terminate service under the March 2010 agreement. While Comlink asserted at oral argument that Qwest was obligated to follow the notice provision of section 313(2), any

⁷ See 2 Tr 30.

⁸ See 2 Tr 31.

obligation Qwest had to provide notice that it was “proposing to discontinue a regulated service to an exchange” was due to Comlink’s contractual arrangements, which put Qwest in the position of sole toll provider. Once Comlink agreed to use an alternative provider, Qwest was no longer in the position of proposing to discontinue service to an entire exchange. Comlink’s complaint does not state a claim for injuries flowing from the absence of notice, when it had actual notice of the proposed termination and was able to bring this matter to the attention of the Commission, invoking as it did so the protections of sections 203(13) and 313.

Nor is Comlink persuasive that the Commission should consider whether Qwest’s threat to terminate toll service was wrongful. Qwest did not terminate service to Comlink without Comlink’s agreement. This PFD presumes that had Comlink not entered into the stipulation, its rights under the MTA would have been fully protected. Comlink has not established that the threat itself, even if a breach of the March 2010 contract, gives rise to a claim for damages such costs and attorney fees, or fines and penalties under the MTA.

Comlink argues that the public policy implications of Qwest’s interpretation of the March 2010 agreement threaten the availability of toll service to rural ILECs, a matter within the scope of the Commission’s mandate to assure the availability of toll service. While Comlink correctly recognizes that a defense to mootness exists for matters capable of repetition but evading review, Comlink has not established that the “access arbitrage” claim is likely to be repeated, or explained how the Commission could protect rural ILECs through relief granted to Comlink. And as noted above, rural ILECs who do

not offer toll or have interconnection with a toll provider can seek interconnection under section 306 of the MTA.

In light of the stipulation, therefore, this PFD concludes that Comlink has failed to explain why this matter is not moot. Since Comlink's complaint does not identify any clear authority for the Commission to award further relief to Comlink, i.e. authority for the Commission to resolve the fee-related contract dispute, award costs including attorney fees, or assess fines and penalties, this PFD recommends that the matter be dismissed for failure to state a claim on which relief can be granted.

Based on this recommended disposition of this matter, the existing schedule in this case is canceled.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Sharon L. Feldman
Administrative Law Judge

April 5, 2011
Lansing, Michigan
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